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## FORCIBLE ENTRY BY LANDLORD WITHOUT PROCESS OF LAW AS A MEANS OF OBTAINING POSSESSION OF DEMISED PREMISES.

The point at which the law of landlord and tenant, as existing in most of the states, has failed to satisfy fully the demands of justice is the lack of an effective and prompt remedy by which a landlord might be enabled to recover demised premises on failure of the tenant to pay his rent or perform any other of the essential covenants of the lease. Unscrupulous and dishonest tenants are constantly taking advantage of the defenseless condition of landlords in this regard, and obtaining two or three months' rental gratis before they can be legally ejected. Moreover, a further obstacle to the landlord is the susceptibility of constables to improper influences and the tendency of a jury in a justice court to invariably decide a case of unlawful detainer against the landlord whatever may be his evidence. These obstacles necessitate an appeal to the circuit or district court, and by the time the case is finally decided and the tenant forcibly ousted the latter has enjoyed a free and unhindered occupancy of the landlord's property to the latter's irreparable damage, a result which arises not only from the detention of the premises but from the imposition of the costs of the proceedings necessary to oust the tenant. This is a practical question of law which no fine-spun theory can answer or satisfy.

The common law offered the landlord no possessory remedy at all against his tenant except that of ejectment. But, as McAdam suggests this remedy, "on account of the length of time and expense involved in order to obtain a legal judgment therein was found to be inadequate to protect the rights of landlords, while it afforded irresponsible and dishonest tenants a shield to enable them to defy and resist the lessor after his right of possession had become complete." McAdam on Landlord and Tenant, p. 966. This inadequacy of the remedy by ejectment led to the enactment of statutes in England and in most of the United States providing for the enforcement by the landlord of certain summary remedies for immediate possession. These statutes are in force in most of the states, but the improper influences and delays incident to their prosecution in the justice courts have destroyed the real efficacy of these remedies. The vital essential of a landlord's remedy for possession of his property after default is the right of immediate entry, and delay invariably results to his injury. The unlawful detention of rental property works a far greater damage on the owner than the unlawful detention of any other kind of property however valuable. A diamond ring worth ten thousand dollars may be detained unlawfully, but its detention would not work one-tenth of the damage to the owner that would result from the detention of rental property worth one-tenth of the diamond's value.

It naturally results in every case where the law fails to provide a remedy, that the injured citizen will seek to become a law unto himself and protect his own interests. In the special case we have for consideration at this time the landlord on the failure of the law to put him in possession of his property, betook himself naturally to the most summary and complete of all remedies open to him,—resuming the possession of his own property by main physical force. This was undoubtedly the origin, divorced from all theoretical or sentimental conceptions of the case, of what is known as the landlord's right of entry after termination of the lease or default. While this right of the landlord is now universally recognized, much disagreement has existed among the authorities as to the manner of its enforcement. It is admitted everywhere that a landlord, may take peaceable possession of the premises. That is, if the tenant is away or can be persuaded or induced to leave the premises temporarily, the landlord may enter and take possession, even if he is compelled to break his way in, and remove the property of the tenant and incurs no civil liability to the latter under any circumstances, provided he does not unnecessarily or negligently injure the tenant's property. Clark v. Kelcher, 107 Mass. 406; Mussey v. Scott, 32 Vt. 82; Looram v. Burlingame, 16 La. Ann. 199; Freeman v. Wilson, 16 R. I. 524; Mershon v. Williams, 62 N. J. L. 779; Smith v. Loan Association, 115 Mich. 340.

Whether, however, the landlord may dispossess the tenant by main physical force and

without process of law is a question on which the authorities are divided. The weight of authority undoubtedly is that a landlord may use such force as is necessary, not only to break in the premises but to overcome the resistance of the tenant and forcibly expel him without rendering himself liable to a civil action for trespass or assault and battery. Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272; Tribble v. Frame, 7 J. J. Marsh. (Ky.) 599, 23 Am. Dec. 439; Rush v. Manufacturing Co. (S. Car. 1900), 36 S. E. Rep. 497; Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484; Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442; Sterling v. Warden, 51 N. H. 217; Kellam v. Janson, 17 Pa. St. 467; Walton v. File, 18 N. Car. 567; Ives v. Ives, 13 Johns. (N. Y.) 235; Allen v. Keily, 17 R. I. 731, 33 Am. St. Rep. 905.

In England the law was unsettled for some time. All the old cases adhering strictly to the early common law, held that a landlord was liable to an action of assault and battery and for trespass *quare clausum fregit*, where he forcibly entered into the demised premises and ejected the tenant. Newton v. Harland, 1 Man. & Gr. 644, reviewing the authorities. The correctness of the decision in the case of Newton v. Harland was, however, doubted, in Harvey v. Bridges, 14 M. & W. 437, by Baron Parke, and the doctrine as there stated were finally overruled in Blades v. Higgs, 10 C. B. (N. S.) 713, by Chief Justice Earle, who, in the course of his argument, makes the following comment: "If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would often be worse than the mischief; and the law would aggravate the injury, instead of redressing it." It is evident from the decisions just stated that the early common law gave no right of forcible entry to the landlord, and that it was mainly the practical necessity therefor, that induced the courts to put into the hands of the landlord a remedy apparently so harsh and yet one so necessary for his proper protection.

The case of Allen v. Keily, *supra*, is interesting because of the attempt of the trial court to make a plausible exception to the rule giving the landlord the right of forcible entry. While admitting the right of the landlord to forcibly enter his own premises and dispossess a tenant or any one whose possession is that of a mere trespasser, the trial court, nevertheless, instructed the jury that if one is out of possession of property held by another under a color of right, he has no right to use personal violence to regain possession. In holding such an instruction to be error, the Supreme Court of Rhode Island says: "The question as to whether Mr. Baldwin was entitled to possession was a mere question of right depending upon the fact as to whether the tenancy had been legally terminated, and not upon the belief of the tenant as to her right to remain. Possession to real estate is either rightful or wrongful. And the right to the possesssion thereof, like the right of ownership, is to be determined solely by the evidence submitted, and the law applicable thereto, and is not dependent upon, or in any degree affected by, the belief of the claimant as to such right. If this were not so it would be in the power of anyone in the wrongful possession of real estate, who believes his possession to be rightful, to compel the person who is legally entitled to the possession thereof to resort to an action at law to recover the same, thus practically nullifying the right which the law confers upon the owner to take forcible possession."

The authorities in this country, however, have not all appreciated the practical difficulty of the landlord who is deprived of the possession of his own property without recompense. They fail to see the peculiar nature of the landlord's investment, the income from which is dependent solely on his right of possession. If an irresponsible tenant refuses to pay his rent and still retains possession of the property and compels his landlord not only to wait two or three months before he can legally dispossess him, but also to expend a comparatively large sum of money to get him out, the damage to the landlord is absolutely irreparable. He has lost several months' rent and the costs of the suit, and, if subsequent tenants should be equally irresponsible and dishonest, his income would not only be totally destroyed, but his property would actually become an expense and a financial burden to him. As we have stated, however, there are authorities, which look upon the relation of landlord and tenant much as children look upon the relation of little red riding hood and

the wolf in the familiar fable,—the wolf, of course, typifying the landlord,—and hold that if a landlord breaks into the demised premises, after termination or default, and forcibly removes the tenant and his property, he is liable for trespass *quare clausum fregit* for entering unlawfully the *tenant's* property and for assault and battery for using the necessary force to expel the tenant. Entelman v. Hagood, 95 Ga. 390; Dustin v. Cowdry, 23 Vt. 631; Larkin v. Avery, 23 Conn. 311; Fox v. Brissac, 15 Cal. 223; Noel v. McCrory, 7 Coldw. (Tenn.) 623; Page v. De Puy, 40 Ill. 506; Thiel v. Land Co., 58 N. J. L. 212; Thayer v. Waples, 26 La. Ann. 502.

The reason asserted in most of the cases above cited for denying to the landlord the right of forcible entry and expulsion of the tenant is that the remedy given by the statute in most of the states for obtaining summary possession of demised property is intended to supersede the common law right of entry. In speaking of the remedy provided by such statutes, the Supreme Court of Georgia, says: "In view of that remedy, there is now no need for a landlord to use personal force to accomplish the summary ejection of a tenant who no longer has a right to occupy the rented premises. The legal remedy is full, ample and capable of speedy enforcement, and one of its objects must have been to prevent landlords from resorting to personal force to regain possession of their property." Justice Lumpkin, who delivered this opinion had the frankness to close his argument with this statement: "The question with which we have been dealing is not, we are frank to say, absolutely free from doubt; but, after careful reflection, we believe we have adopted the safer course in holding as announced."

No fault whatever can be found with Justice Lumpkin's argument so far as it goes; it is certainly the highest purpose of the law to prevent violence and the redress of grievances in any other manner than by proper process of law. Where, however, as in this case, the citizen, not only has a legal right which the law recognizes but does not adequately enforce, but also where the denial of a prompt and effectual remedy results in irreparable loss to him, the situation is a peculiar one and demands a more generous consideration. If a man illegally detains my personal property, I can have a constable seize possession of it at once on giving proper bond. The law, however, does not permit me to replevin the house I have rented, but which is illegally detained, and from the possession of which I derive my sole income. Indeed, it has been solemnly decreed that "the writ of replevin was never intended as a means of interference with the sanctity of home, and as an instrument to remove summarily a tenant who has a possession which he has a right to retain until removed by due process of law, made and provided for such cases." Smith v. Grant, 56 Me. 255. This statement of the law of itself satisfactorily establishes the charge that the term "legal science" is a misnomer. The irony of the thing is that the law gives the effective remedy of replevin for the detention of personal property, where such detention results ordinarily in very little damage and denies it in cases of the detention of real property, where, in most cases, the damages are both serious and irreparable. It is this unfortunate failure of the law to adequately protect the landlord in cases of this kind which has led the majority of the courts in this country and in England to permit the landlord to take the law in his own hand and secure possession of his property much after the manner in which a sheriff or constable under writ of replevin would take possession of personal property illegally detained. In either case the law can well afford to permit such a summary proceeding, because both the sheriff and the landlord are responsible parties and in either case are permitted to use only such force as is reasonably necessary to secure possession. If the landlord acts maliciously or uses more force than necessary, or negligently injures the tenant's property, he is liable in damages. Moreover, if the eviction itself be illegal, the tenant can quickly secure proper redress, which any jury in the country that could be drawn together would be careful to make ample and complete. If it is proven that the tenant's possession was absolutely without even a shadow of right, and that he was nothing but a trespasser, no court would be justified in giving ear to his objection that he was improperly evicted. Such a rule serves the ends of justice and does not necessarily occasion any serious breaches of the peace.

Some legislatures, however, in obedience to a thoughtless and inconsiderate public clamor,

have passed statutes providing that "no person shall make entry in lands, tenements or other possessions but in cases where entry is given by law, and in such cases he shall not enter with force, but only in a peaceable manner." These statutes, however, have been much modified by the courts, which have construed the word "force" to mean "riot" or "tumultuous manner," and, therefore, possession obtained by stratagem and not in a "tumultuous manner," although accomplished by force, would not be within the statute. Smith v. Building Association, 115 Mich. 340; Smith v. Reeder, 21 Oreg. 541; Fort Dearborn Lodge v. Klein, 115 Ill. 191. This construction, while it evidences wise policy on the part of the courts, is a little short of judicial usurpation of legislative prerogatives. It might be suggested to legislatures who might be contemplating the enactment of similar provisions that a more just and adequate settlement of this question would be to give to the landlord a summary writ for immediate possession similar to the remedy by writ of replevin. In such a case a landlord would only be doing by process of law that which the weight of judicial authority permits him to do without such process and on his own responsibility.

## NOTES OF IMPORTANT DECISIONS.

PHYSICIANS AND SURGEONS—RIGHT OF PHYSICIAN TO HAVE HIS ALLEGED MALPRACTICE TESTED BY PHYSICIANS OF HIS OWN SCHOOL.—The rule has been laid down, and not without justice or reason, that when a physician is sued for malpractice, he is entitled to have the propriety of his treatment tested by physicians of the same school; that is, if a physician of the allopathic school should be sued for malpractice, the methods of that school shall alone be considered in testing the defendant's conduct, and the testimony of the homeopathic school, for instance, would be incompetent. This rule was announced in the case of Martin v. Courtney, 75 Minn. 255. In another very recent case from the same state, the court sets a limitation to this rule in the case of the use of scientific appliances such as the X-ray. The court held in that case that a physician who applies the X-rays, not for medical purposes, but to locate a foreign substance in the body of his patient, is not entitled to have the question of his care and skill in applying it determined by the opinions of physicians of his own school.

The court in discussing this question, said: "The application of the X-ray to plaintiff was not for the purpose of treating any disease or ailment from which he suffered, but for the purpose of locating, if possible, a foreign substance thought to be in his lungs. While it, perhaps, may in some instances be used as a remedial agent, it was not so employed in this case. The so-called X-rays, discovered by Roentgen, have been recognized and known to scientists, both in and out of the medical profession, for some eight years. During this time the apparatus for the generation of the X-rays, together with the fluoroscope, has been used very generally by electricians, professors of physics, skiagraphers, physicians and others, for experimental and demonstrative purposes. It is a scientific and mechanical appliance, the operation of which is the same in the hands of the college professor, or the physician of the allopathic, homeopathic, or any other school of medicine. It may be applied by any person possessing the requisite scientific knowledge of its properties, and there would seem to be no reason why its application to the human body may not be explained by any person who understands it. The rule in the Courtney case can, therefore, have no application to the case at bar. It might apply, did it appear that the application of the X-rays to plaintiff's person was for medical purposes, and not for the scientific purpose of discovering the presence of a foreign substance in his lungs."

SEDUCTION—HYPNOTIC INFLUENCES AS A MEANS OF OVERCOMING RESISTANCE.—That hypnotism is still regarded as an absurd fancy by the courts is clearly evidenced by the recent case of Austin v. Barker, 85 N Y. Supp. 465. This was an action for seduction. The seduced girl testified that, owing to defendant's having hypnotized her, she had no knowledge or recollection of the acts of illicit intercourse until the birth of her child, when, being placed in a hypnotic condition by a third person, she recalled the events. The court, on appeal, discounted the value of such evidence and held that it was insufficient to support a verdict for plaintiff. The court gives this clear statement of the reasons which induced its decision:

"We do not feel called upon to discuss or determine the rather shadowy boundaries of hypnotism, or its possibilities in explaining and accounting, upon legal trials, for what otherwise might fairly be considered as incredible. It is suggested by plaintiff's counsel upon this appeal that we may judicially recognize as a matter of ordinary experience and knowledge that the abnormal physical conditions and changes which precede childbirth are frequently accompanied by a corresponding mental disturbance, including loss of memory. If we should accept this suggestion, it would not explain that which confronts us in this case, for plaintiff's witness did not for a period lose recollection of things theretofore lodged in her mind, with subsequently recurring memory. Through an alleged peculiar mental condition she became conscious and aware of

events of which she had never before been at all conscious. We are therefore thrown back upon plaintiff's explanation and theory of hypnotism, and it suffices to apply to it the ordinary rules of evidence and common sense. The explanation given in behalf of plaintiff's case is opposed to ordinary experience and knowledge. If, as explanatory thereof, plaintiff relied upon some science and theory not generally known or understood, it was proper for him to give the jury the light of some competent evidence tending to sustain the probabilities, or at least possibilities, of what was claimed. Nothing of this kind was done upon the trial, unless there may have been read then, as upon this appeal, the unverified statements and opinions of certain authors. We are unwilling to accept them, or the otherwise unconfirmed statements of the witness that at certain times in 1900 she was placed in an hypnotic condition whereby she was made unconscious, and again in a similar condition in 1901 whereby she was made conscious, of certain events. The rejection of this evidence leaves this case, in our opinion, without sufficient testimony upon which to rest the burden carried by plaintiff to properly establish his case, and sustain the verdict of the jury."

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WITNESSES—RELIGIOUS BELIEF OF WITNESS AS AFFECTING HIS COMPETENCY OR CREDIBILITY.—At the common law it was well settled that an atheist was incompetent as a witness. The recent case of Brink v. Stratton, 68 N. E. Rep. 148, calls attention to the fact that the last vestige of the common law rule on this question has vanished. In that case it was held that even for the purpose of affecting the credibility of a witness he cannot be interrogated as to his belief in the existence of a Supreme Being, who would punish him for false swearing. The court gave the following interesting history of this question:

At common law no one but a Christian was a competent witness, and, as testimony could be given only under the sanction of an oath, even Christians (such as Friends and others) who deemed the taking of an oath unlawful were necessarily excluded from testifying. The common-law rule was relaxed from time to time, either by statute or by judicial decisions, until as the law stood in this state prior to the adoption of the Constitution of 1846: "Every person believing in the existence of a Supreme Being who will punish false swearing, shall be admitted to be sworn, if otherwise competent." 2 Rev. St. 408. § 87. And it was further enacted by the legislature that "no person shall be required to declare his belief in the existence of a Supreme Being, of that he will punish false swearing, or his belief or disbelief of any other matter, as requisite to his admission to be sworn or to testify in any case. But the belief or unbelief of every person offered as a witness may be proved by other and competent testimony." *Id.* 408, § 88. It was immaterial whether the witness believed that Divine punishment would be inflicted in this world or n the next (1 Greenl. Ev. § 369); though it seems that prior to the legislation referred to the rule was to the contrary, and it was necessary that the witness believe in a future state of rewards and punishments (Jackson v. Gridley, 18 Johns. 98; Butts v. Swartwood, 2 Cow. 431). But by the Constitution of 1846 there was added to the previously existing constitutional declaration of religious liberty the further provision: "And no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." This amendment, of course, established the competency of an infidel or an atheist as a witness. As to this there is no dispute.

But it is contended that, though the witness may not be excluded from testifying by reason of being an infidel, he may be interrogated as to his belief, and his infidelity be considered by the jury on the question of his credibility. This was so held by the Supreme Court in Stanbro v. Hopkins, 28 Barb. 265, though the declaration was obiter, the judgment having been reversed on another point. The same view was taken by this court without discussion in People v. Most, 128 N. Y. 108, 27 N. E. Rep. 970, 26 Am. St. Rep. 458. The question has arisen in other states. In Iowa the rule in the Stanbro case seems to have been adopted. Searcy v. Miller, 57 Iowa, 613, 10 N. W. Rep. 912; State v. Elliott, 45 Iowa, 486. On the other hand, in Virginia and in Kentucky, under constitutional provisions not as explicit as our own, but enacting liberty and equality of religious belief, it has been held that a witness cannot be interrogated as to his belief in the existence of a Deity or a future state for the purpose of affecting his credibility. Perry's Case, 3 Grat. 632; Bush v. Commonwealth, 80 Ky. 244. The record of the proceedings of the convention by which this constitutional provision was formulated shows that the view taken by the Virginia and Kentucky courts is the correct one. The provision was the subject of discussion and debate, and was not adopted without opposition. The member who introduced the provision (Mr. Taggart, of Genesee) said that he had known the question of a witness' belief in a Supreme Being being raised but once, and trusted that he should never see it raised again. But, he said, if there was anything in this, "let it go to the jury; let it go to his credit, and not to his competency." Acting on this suggestion, another member moved an amendment: "But evidence may be given as to the belief or disbelief of the witness in the obligation of an oath and of the grounds of such belief or disbelief, in order to enable the jury to judge of his credibility." This amendment was rejected by a vote of 92 to 12. Crosswell & Sutton Debates, pp. 808, 809.

The learned court in the Stanbro case said with entire truth that, though a witness may be competent, his credibility may be impaired. It then argued that in analogy to the case of a party to

an action who is now a competent witness, but whose interest in the cause goes to his credibility, so the religious belief of a witness, while not rendering him incompetent, might be considered on the question of the credit to be accorded him. We think the learned court was misled by a false analogy. Interest in the subject matter and relationship to the parties are temporal and mundane influences which common experience teaches us tend to bias consciously or unconsciously the testimony of witnesses. But such is not naturally the result of abstract religious belief.

It has been seen that in the condition of the law just prior to 1846 the only religious view that excluded a witness was failure to believe in Divine punishment. Thus fear was deemed the only influence by which veracity in witnesses could be assured. If, despite the constitutional enactment that no such test of competency shall longer prevail, inquiry on the subject is still to be made with reference to the witness' credibility, I think we may be led into great embarrassments. I do not see why a witness who declares merely his ignorance as to whether there is or is not a Deity who will punish false swearing is less amenable to fear than one who believes that his future state, whether of salvation or punishment, has been decreed from all eternity, regardless of faith or good works. Yet the denomination holding this doctrine in its confession of faith has given to American history at least as many great names as any other religious sect. I think that the learned court in the Stanbro case failed to appreciate that when the constitution abrogated all disqualifications from office or civil rights the consideration of a witness' religious belief on the question of his credibility necessarily fell at the same time. On the trial of a cause, as is pointed out by the Supreme Court of Virginia, the judge may be a skeptic or an infidel and the juror an agnostic or an atheist. Neither can be excluded for that reason from sitting in judgment. Is it possible that we would uphold the submission to a jury of a witness' belief in Christianity as impairing his credibility? It is said by one of the learned judges in the Stanbro case with reference to the practice of interrogating a witness as to his religious belief: "I have no fears that this rule will encourage parties to scandalize truly religious witnesses by imputations that they profess the worst of creeds. For, so long as no religious test shall be required for judges and jurors, parties will be loath to cross-examine witnesses as to their opinions on matters of religious belief, unless they are well assured the opinions of the witnesses are very obnoxious to the sentiments of citizens who say with Pope:

> For modes of faith let graceless zealots fight,
> He can't be wrong whose life is in the right.

That which the learned judge considered a safeguard against the abuse of the practice, to me constitutes its danger. Doubtless, no wise advocate will interrogate a witness as to his religious belief unless it is obnoxious and unpopular in the community. But that is the very case in which the exposure of a witness' religious belief would probably lead to injustice.

I do not say that no cross-examination into a witness' religion can at any time be had. The religious creed of a person may not deal exclusively with his relations to his Creator, but may enjoin acts forbidden by law, or forbid compliance with the law. The weight of authority seems to be that the Thugs in India committed their crimes under the direct sanction, if not command, of their religion. Of course, a witness may be interrogated as to whether he thinks it wrong to give false testimony, whether his religion requires him to commit a crime. These inquiries relate to temporal matters, not to spiritual or theological ones. So, also, a witness may be asked whether he is a member of the same church as that of one of the parties. This also involves no direct inquiry into his religious belief, but only as to his associations. Experience teaches us that we may be biased in favor of our associates, whether in a church, in a club, or in a business institution. Possibly the most "obnoxious" religious faith to-day is that of the Mormons. In a prosecution for polygamy a witness might properly be asked if he was a Mormon, and whether his religion did not enjoin, or at least approve, that practice. But when a Mormon sues on a bill for groceries, in my judgment it is neither constitutional nor reasonable to interrogate him on the subject of his belief for the purpose of exciting prejudice against him.

## ENTRAPMENT OR DECOY SOLICITATION AS A DEFENSE TO CRIMINAL PROSECUTION.

The entrapping or decoying of one into the commission of a crime is a practice in the detection and prosecution of criminals that, although not a defense if restricted to certain limits, has met with much criticism and adverse discussion by the courts.[1] Many times the criminal, if left to himself, would not perpetrate the crime that others in the role of a detective, by unremitting effort, have induced and encouraged him to commit. Frail human nature, it has been remarked, is prone enough to crime, without being purposely tempted, and in many such cases the spy is, of the two, really the more criminal, and his conduct the more reprehensible. Yet it is not to be denied, as the courts have observed, that shrewd detective work is necessary to

[1] See opinion of Marston, J., in Saunders v. People, 38 Mich. 219.

cope with the criminal classes, and to arrest the progress of crime, especially in the complexity of urban conditions.

The interposition of the defense suggested by the subject of this paper occurs most commonly in prosecutions for robbery, larceny or burglary, the crime of extortion as it is defined by the statutes of some of the states, bribery, the unlawful selling of intoxicating liquors, and the making of an improper use of the mails.

The philosophy of the rule making the entrapment or decoying of one into the commission of certain crimes against the person or property in particular a defense to a prosecution therefor is not that one who commits a criminal act is to be shielded from its consequences, because he was induced to commit it by another, but that the apparently injured party by his conduct, or the conduct of his agent, consents to the doing of whatever is done, and thereby deprives the act, otherwise unlawful, of its criminality.[2] As was said in the recent case of People v. Gardner,[3] a case in which this defense was presented: "Whether certain acts are or are not criminal depends entirely on whether the person on or against whom they are perpetrated consents to or participates in those acts. Such acts do not constitute a crime in case the assent of the person against whom they are committed is freely given. * * * That no injury is done to the willing is a maxim of the criminal, as well as of the civil law, if the one who consents is capable of consenting, and consents uninfluenced by fear, force, or fraud."

Whether or not the conduct of one against whom a crime was intended to have been committed amounts to his consent to whatever the accused did, is, it is held, a question of fact for the jury under appropriate instructions from the court.[4]

It is universally held, and justly so, by the courts, that there can be no crime committed against one who suggests to the accused the commission of the acts complained of. The accused must himself originate the criminal design, and execute it. "If it appears that the intent to commit the crime," as was said in Dalton v. State,[5] "did not originate with the accused, but was suggested by the person present with him, with the knowledge and approval of the victim, the prosecution will fail."[6] So where a railway company procures detectives to induce another to join them in robbing one of its trains, the detectives originating and devising the scheme of the robbery and suggesting it to the accused, such conduct is a defense to a prosecution for anything done under such circumstances against the railway company. And where the owners of a bank employ detectives who ascertain the identity of certain supposed criminals, persuade others to join them in robbing such bank, acting apparently as accomplices in the transaction, a conviction for the robbery cannot be sustained.[7]

Not only must the accused originate the intention to do the unlawful act, but he must himself do everything that is necessary to make out and constitute the crime under the law. The acts of the person present and cooperating with him, with the knowledge and consent of the apparent victim, cannot be imputed to the accused so as to make out the perfected offense. Where, therefore, anything is omitted to be done by the accused necessary to constitute the crime charged against him, but which was done by his apparent accomplice, the defendant has a good defense to a prosecution for such acts.[8]

The acts of the apparent accomplice are done without the intent necessary to render the acts done criminal; and no criminal wrong because of such acts can, therefore, be imputable to the one sought to be entrapped, who must act with felonious intent.[9] Thus,

[2] People v. McCord, 76 Mich. 200, 42 N. W. Rep. 1106; State v. Abley, 109 Iowa, 61, 80 N. W. Rep. 225, 49 Cent. L. J. 380.

[3] 25 N. Y. Supp. 1072, 73 Hun, 66, 57 N. Y. St. Rep. 18, 9 N. Y. Crim. Rep. 124.

[4] State v. Jansen, 22 Kan. 498; State v. Sneff, 22 Neb. 481, 35 N. W. Rep. 219, 49 Cent. L. J. 380; Thompson v. State, 18 Ind. 386; State v. Abley, 109 Iowa 61, 80 N. W. Rep. 225, 46 L. R. A. 862, 49 Cent. L. J. 380; State v. Hayes, 105 Mo. 76.

[5] 113 Ga. 1037, 39 S. E. Rep. 42.

[6] Connor v. People, 18 Colo. 373, 33 Pac. Rep. 159, 25 L. R. A. 341; Roberts v. Territory of Oklahoma, 9 Okla. 326; State v. Adams, 115 N. Car. 775, 20 S. E. Rep. 722.

[7] Sheider v. State, 3 Tex. Ct. App. 156, 30 Am. Rep. 126.

[8] State v. Douglass, 44 Kan. 618; State v. Stickney, 53 Kan. 308, 36 Pac. Rep. 27; State v. Jansen, 22 Kan. 498; People v. Collins, 53 Cal. 185, 7 Cent. L. J. 261; Dalton v. State, 113 Ga. 1037, 39 S. E. Rep. 42; State v. Hayes, 105 Mo. 76.

[9] State v. Jansen, *supra;* People v. Collins, *supra;* State v. Hayes, *supra.*

where the agent of an owner of certain property apparently arranges with another to steal it, the owner thereof consenting to all that is done by the agent, and the agent, pursuant to such a plan, takes—steals, as the defendant supposes—such property and delivers it to him, the defendant doing nothing more than to receive the property thus taken, the acts of the agent do not complete the crime against such defendant.[10]

Where one is informed that another intends to commit an offense against him or his property, the law does not imply the consent of the one intended to be wronged by his failing or neglecting thereupon to take steps to prevent the commission of the crime. He may let the intending wrongdoer go on with his crime, without disturbing any of the means of committing it, and devise and execute a plan to apprehend the wrongdoer after the crime has been committed.[11] The rule was thus tersely put by the Supreme Court of Iowa, in the recent case of State v. Abley, *supra*: "One who knows of a crime contemplated against him may remain silent and permit matters to go on, for the purpose of apprehending the criminal without being held to have assented to the act." In another case it was said: "One who is trying to steal the property of another is in the condition of a beast of prey, and it is as lawful to trap such a person as it is the beast of prey."[12] Thus, where an owner was advised of an intended burglary of his dwelling and took no steps to prevent the commission of the crime, but provided a force in the building to be entered to apprehend the defendant;[13] and where one, having been informed of the practice of the defendant to rob a stage coach, traveled with it to apprehend the defendant and permitted him to take certain property from his person, thereupon taking the defendant into custody;[14] it was held in each case that such facts afforded no ground for holding that the accused acted with the consent of the parties whom he intended to wrong.

Nor may the accused assent that he acted with the consent of the injured party, even where such injured party has facilitated, and afforded opportunities for, the commission of the crime. The criminal's defense does not arise when the injured party's merely passive conduct ends.[15] Thus the fastenings of a window may be loosened to enable a burglar to enter with less difficulty.[16] The California Supreme Court has even held that, where a police officer disguises himself and feigns to fall in a drunken stupor in a remote alley and, while perfectly conscious, permits the defendant to take money from his pockets, the defendant intending a robbery, such conduct does not amount to a consent to the taking.[17] But in an earlier case the same court intimated that if the prosecutor should arrange with another to meet such person who was to have the defendant with him, to go through the form of robbing the prosecutor, the carrying out of such a plan would not render the defendant guilty of the robbery.[18] One may even employ another to act and cooperate with the intending criminal in the commission of his crime, and be with him at the time the same is committed for the purpose of taking the criminal into custody, without being held to have assented to what is done against him.[19]

The act of a detective, or of an agent of one against whom a wrong is committed, may, however, deprive the acts of the wrongdoer of some of their otherwise criminal elements, and have effect to stamp a different character upon the crime, even if not affording a complete defense to it. Where a servant, pretending to concur with others in com-

[10] People v. Collins, *supra*.

[11] State v. Abley, 109 Iowa, 61, 80 N. W. Rep. 225, 46 L. R. A. 862, 49 Cent. L. J. 380; People v. McCord, 76 Mich. 200; Commonwealth v. Nott, 135 Mass. 269; State v. Jansen, 22 Kan. 498; Thompson v. State, 18 Ind. 386; Dalton v. State, 113 Ga. 1037, 39 S. E. Rep. 42; State v. Sneff, 22 Neb. 481, 35 N. W. Rep. 218; People v. Liphardt, 105 Mich. 80, 62 N. W. Rep. 1022; State v. Adams, 115 N. Car. 775, 20 S. E. Rep. 722; United States v. Wright, 38 Fed. Rep. 106; State v. Stickney, 53 Kan. 308, 36 Pac. Rep. 27, 42 Am. St. Rep. 284.

[12] Varner v. State, 72 Ga. 745, 746.

[13] Thompson v. State, 18 Ind. 386, 18 Am. Dec. 364.

[14] Worden's Case, Fost. C. L. 129.

[15] People v. Hanselman, 76 Cal. 460; State v. Duncan, 8 Rob. (La.) 563; Varner v. State, 72 Ga. 745; Dalton v. State, 113 Ga. 1037, 39 S. E. Rep. 42.

[16] State v. Jansen, *supra*.

[17] People v. Hanselman, 76 Cal. 460.

[18] People v. Clough, 59 Cal. 438.

[19] State v. Stickney, 53 Kan. 308, 36 Pac. Rep. 27, 42 Am. St. Rep. 284; Robinson v. State, 34 Tex. Cr. Rep. 71, 29 S. W. Rep. 40, 53 Am. St. Rep. 701; Dalton v. State, 113 Ga. 1037, 39 S. E. Rep. 42; Commonwealth v. Hollister, 157 Pa. St. 13, 25 L. R. A. 349; People v. Morton, 4 Utah, 407; State v. Duncan, 8 Rob. (La.) 562; Connor v. State, 24 Tex. Cr. App. 245, 6 S. W. Rep. 245; United States v. Wright, 38 Fed. Rep. 106.

mitting a burglary of the master's dwelling, opens the door to admit such other persons, the master consenting to the conduct of the servant, the crime, it has been held, is not that of burglary, but of larceny, the act of the servant in admitting the defendants rendering the entrance not a breaking.[20] The same has been held in a case in which the servant, with the owner's consent, furnished the intending wrongdoer with a key to the door of the building intended to be burglariously entered.[21] But in such cases the wrongdoer could not set up the servant's conduct as a defense to a prosecution for the larceny of property taken while thus in the house.[22] Where, however, the act of the agent or servant in permitting an entrance by the defendant into the dwelling is without the acquiescence or consent of the occupant, the act of such servant or agent is no defense to a prosecution even for the burglary.[23] Many of the courts, however, announce the rule that, for one to employ a detective, or to permit any other agent, to aid or encourage the commission of an offense against one is to consent to, and thereby to excuse, it, notwithstanding the accused may himself have originated the criminal intention.[24] The Illinois Supreme Court, as an exponent of this view, in a recent case, said: "Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil, when financially embarrassed and impoverished. A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity so the consequent crime may be punished is a dangerous practice. It is safer law, and sounder morals, to hold that where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act, by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it for himself, but they must not aid, encourage or solicit him that they may seek to punish."[25] The Iowa court, in a recent case, severely criticised the conduct of one who, for the purpose of detection and prosecution, procured a detective to encourage the commission of an offense, and with advice to stimulate the defendant to his wrongdoing; and, in view of the conduct of the detective, the court reduced the defendant's punishment from three years to six months' imprisonment.[26] In People v. McCord,[27] the Michigan Supreme Court refused to sustain a conviction of the charge of burglary in a case where an agent of the person whose building was alleged to have been burglariously entered, had induced the defendant to become intoxicated, and, while in that condition, to commit the acts for which he was indicted and convicted below. Campbell, J., speaking for the court in that case, said: "It may be true that a person does not lose the character of an injured party by merely waiting and watching for expected developments. Possibly—but we do not care to decide this—leaving temptation in the way without further inducement will not destroy the guilt in law of the persen tempted, although it is a diabolical business, which, if it is not punishable, probably ought to be. But it would be a disgrace to the law if a person who has taken active measures to persuade another to enter his premises, or to take his property, can treat the taking as a crime, or qualify any of the acts done by invitation as criminal. What is authorized to be done is no wrong in law to the instigator." So, the Oregon Supreme Court, in State v. Hull,[28] held that there could be no conviction of larceny where one, employed by cattle owners to apprehend cattle thieves, with the consent and authority of such owners, cooperates with suspected thieves in planning to take, and in taking, the cattle of such owners, for the purpose of having the thieves arrested while driving the cattle away, this upon the ground, however, that such taking was with the consent of the owners. It hardly seems, however, that these decisions are sound, the

[20] Regina v. Johnson, 1 C. & M. 218, 41 E. C. L. 123.
[21] Allen v. State, 40 Ala. 334.
[22] State v. Hayes, 105 Mo. 76.
[23] State v. Abley, 109 Iowa, 61, 64, 80 N. W. Rep. 225, 46 L. R. A. 862, 49 Cent. L. J. 380.
[24] Love v. People, 160 Ill. 501, 32 L. R. A. 139, 43 Cent. L. J. 110; State v. Hull, 33 Oreg. 56, 54 Pac. Rep. 159; Roberts v. Territory, 8 Okla. 326; Williams v. State, 55 Ga. 391; People v. McCord, 76 Mich. 200, 42 N. W. Rep. 1106.
[25] Love v. People, *supra*.
[26] State v. Abley, *supra*.
[27] 76 Mich. 200, 42 N. W. Rep. 1106.
[28] 33 Oreg. 56, 54 Pac. Rep. 159.

rule of the cases already referred seeming to be the correct one upon principle.

Where a detective induces a conspiracy to accomplish an act that would not be criminal, because of the consent of the person intended to be wronged, the conspiracy will also, it has been held, be deprived of its criminality.[29] But if the conspiracy is without the consent or connivance of the one against whom the wrong is intended by the defendants to be perpetrated, it will be no defense to a prosecution for the conspiracy that the conspirators were entrapped into its consummation.[30]

So, in a prosecution for extortion, the gist of the crime being that the complaining party surrendered his money or property by the wrongful use of force or fear, there can be no conviction of a defendant to whom money was given for the purpose, though at the time unknown to the defendant, of inveigling him into the commission of a crime for the purpose of prosecuting him. In such a case the complainant parts with his money or property voluntarily, notwithstanding the defendant intended to take it against the will of the complainant, and believed that the money was so given.[31] But even if there is a willingness upon one's part to give up his money to lay the foundation for the crime of extortion, there can be a convicton for the attempt, as the motive of the defendant is the same whether he accomplishes his purpose or not.[32]

It has been held that it is no defense to an action for the unlawful sale of intoxicating liquors that the defendant was entrapped into making the sale for the sole purpose of furnishing a ground of prosecution against the seller.[33] In the case of the City of Evanston v. Myers, the Illinois Supreme Court refers to the fact that there was no fraud, deceit or inducement to the sale, other than the willingness of the buyer to purchase, but it is not clear that the court's decision was put upon this ground, or made to depend upon this condition. Where, however, the municipal authorities procure a sale of liquors to be made in violation of an ordinanee,[34] or where the officers of the state charged with the enforcement of the law procure such a sale to be made in violation of the statute law,[35] for purposes of prosecution, such acts constitute a defense to prosecutions for such sales. In Ford v. City of Denver, the court, by Thompson, J., said: "It appears that the city was instrumental in procuring the sale of the liquor. Its purpose was to lay the foundation of a suit. * * * The city is in no position to say that its ordinance was violated. It was as much responsible for the sale of the liquor as the defendant, and it will not be permitted to replenish its treasury from penalties incurred at its instigation. It cannot be heard to complain of an act the doing of which it solicited." It may be questioned, however, whether these decisions are sound, as the doctrine of estoppel does not apply to the state in a criminal proceeding.[36] It has been held no defense to the prosecution that the sale was made to one who, for the purpose solely of procuring the unlawful sale to be made to found a prosecution upon, had been furnished money by the citizens of the county, with the knowledge and consent of the prosecuting attorney;[37] and the Rhode Island court, in the case of Tripp v. Flanigan,[38] in an action to recover a penalty under a bond, for a sale in violation of the conditions thereof, held that it was no defense that the sale was made to a police officer, who had been detailed by a superior officer to make such purchase, to ascertain whether the defendant was making, or would make when the opportunity afforded, an unlawful sale, it appearing, however, that the officer neither did nor said anything to mislead the defendant or to induce the sale to be made.

[29] Connor v. People, 18 Colo. 373, 33 Pac. Rep. 159, 25 L. R. A. 341; Woodworth v. State, 20 Tex. Crim. App. 375; Johnson v. State, 3 Tex. Ct. App. 590.

[30] Thompson v. State, 106 Ala. 67, 17 So. Rep. 512; Johnson v. State, 3 Tex. Ct. App. 599.

[31] People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072, 57 N. Y. St. Rep. 18, 9 N. Y. Cr. Rep. 124; People v. Gardner, 144 N. Y. 119, 38 N. E. Rep. 1003.

[32] People v. Gardner, 144 N. Y. 119, *supra*, reversing 73 Hun, 66, *supra*.

[33] Onanga County Commissioners v. Backus, 29 How. Pr. 33; State v. Lucas, 94 Mo. App. 117; People v. Murphy, 93 Mich. 41, 52 N. W. Rep. 1042; People v. Curtis, 97 Mich. 489, 54 N. W. Rep. 767; City of Evanston v. Myers, 172 Ill. 266, 50 N. E. Rep. 204, reversing 70 Ill. App. 205.

[34] Wilcox v. People, — Colo. App. — (Not yet published in official reports), 67 Pac. Rep. 343; Ford v. City of Denver, 10 Colo. App. 500, 51 Pac. Rep. 1015.

[35] People v. Murphy, *supra*; People v. Curtis, *supra*.

[36] State v. Dudoussat, 47 La. Ann. 977.

[37] State v. Lucas, *supra*.

[38] 10 R. I. 128.

The general rule is that where it is made a crime to accept a bribe, the corrupt intention of the giver is not necessary to constitute the crime of bribery upon the part of the one receiving the same. Under this rule, therefore, one accepting a bribe with corrupt intention is guilty of the crime, even if it be offered to entrap the accused.[39] It can be no defense that the defendant was solicited to accept the bribe by one acting under the direction of the law officers; this upon the ground that such officers "have no right to compromise public justice in such a way."[40]

Likewise, the federal courts have uniformly upheld convictions of offenses against the mails where the wrongdoer was entrapped by the use of decoy letters. Thus, it is no defense to a prosecution for sending through the mail obscene or other matter unmailable under the postal laws that the same was sent in compliance with a request in decoy letters mailed to the accused by post office inspectors under an assumed name.[41]

The distinction has been made that, in such a case, the purpose was not to induce the doing of an unlawful act, but merely to ascertain whether such acts have been, or will be done when the opportunity affords, the act of the accused being none the less voluntarily and deliberately done. This distinction was very aptly stated by the Supreme Court of the United States in a recent case, as follows: "It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of the crime, but it was to ascertain whether the defendant was engaged in an unlawful business. * * * The law was actually violated by the defendant. He placed the letters in the postoffice, which conveyed information as to where obscene matter could be obtained, and he placed them with a view of giving such information to the person who should receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names, and received his letters, was a government detective in no manner detracts from his guilt."[42] But in the case of the United States v. Adams,[43] the court held the defendant not guilty of the charge of mailing forbidden matter where the mailing was done in response to a letter from an officer of the postoffice department enclosing stamps for an answer and soliciting correspondence by mail. In a prosecution for a robbery of the mail it is likewise no defense that the matter stolen was merely decoy matter placed in the mail for the purpose of entrapping the defendant.[44]

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[39] State v. Doudoussat, 47 La. Ann. 977; People v. Liphart, 105 Mich. 80, 62 N. W. Rep. 1022.

[40] People v. Liphart, *supra*; People v. Laird, 102 Mich. 132.

[41] Price v. United States, 165 U. S. 311; Rosen v. United States, 161 U. S. 42; Andrews v. United States, 162 U. S. 420; United States v. Moore, 19 Fed. Rep. 39; United States v. Bott, 11 Blatch. 346; Grimm v. United States, 156 U. S. 604.

[42] Grimm v. United States, *supra*.

[43] 59 Fed. Rep. 674.

[44] United States v. Cattingham, 2 Blatch. 470; United States v. Foye, 1 Curt. C. C. 364.

## BANKRUPTCY — PREFERENCES — SETTING ASIDE CONVEYANCE.

### SHERMAN v. LUCKHARDT.

*Supreme Court of Kansas, November 7, 1903.*

**A conveyance of nonexempt property by a bankrupt to one of his creditors within four months prior to the filing of a petition in bankruptcy by or against him, made with the intent and purpose on the part of the bankrupt alone to hinder, delay, and defraud his creditors, is prohibited by clause "e" of section 67 of the national bankrupt act (Act July 1, 1898, ch. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), and such conveyance may be avoided by the trustee appointed in the bankruptcy proceedings. Sherman v. Luckhardt, 70 Pac. Rep. 702, 65 Kan. 610, overruled.**

**Johnston, C. J., and Smith and Greene, J. J., dissenting.**

POLLOCK, J.: This case is before us upon rehearing. It has been fully rebriefed and reargued. The facts will be found stated in the former opinion of this court. 65 Kan. 610, 70 Pac. Rep. 702. The law there declared reads: "A preferential payment by a debtor to one of his creditors within four months prior to the former's bankruptcy is not void under clause 'b,' § 60, and clause 'e,' § 67, Bankr. Act July 1, 1898, ch. 541, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449], though made with a fraudulent intent on the debtor's part, if it be accepted by the creditor without knowledge of such intent, and without knowledge that a preference was intended." The question is, shall that decision now be upheld or overruled? Prior to the passage of the national bankrupt act of July 1, 1898 (chapter 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), in this and other jurisdictions the estate of an insolvent debtor was often swept away in an unequal division among his creditors, leaving unsatisfied demands to harass and annoy the debtor. The intent of the lawmaking power in the passage of this act was twofold. First, the protec-

tion and discharge from liability of the bankrupt; second, the equal distribution of his nonexempt property among his creditors in proportion to their provable demands. Swarts v. Fourth National Bank, 117 Fed. Rep. 3, 54 C. C. A. 387; *In re* Gutwillig, 92 Fed. Rep. 337, 34 C. C. A. 379. One of the methods employed by the insolvent debtor to effect an unequal distribution of his estate among his creditors before the passage of this act was, without any fraudulent intent on his part, to prefer one or more of his creditors over others. Another method was to transfer a portion or all of his property to one or more of his creditors to the exclusion of all others, with the intent on his part to hinder, delay and defraud his other creditors. In the case first mentioned the transfer was without fraud, and therefore valid. In the second case, the transfer having been made without any guilty knowledge on the part of, or participation in the fraudulent act of the debtor by the creditor, the transfer was upheld as valid. To remedy this, among other existing evils, the act was passed.

In the case at bar it is found by the court, from the evidence, as follows: "(8) That the said William Luckhardt, in causing the above described real estate to be conveyed to this defendant, intended thereby to prefer this defendant over his other creditors. (9) That the said William Luckhardt, in causing the above described real estate to be deeded to this defendant, intended thereby to hinder, delay and defraud his other creditors. (10) That the said defendant was not a purchaser of said real estate in good faith and for a present fair consideration." "(12) That upon the trial of this action the counsel for plaintiff admitted that the said William Luckhardt, at the time he caused to be conveyed to the defendant the real estate hereinabove described, was indebted to the said defendant in the sum of $1,500, and that it was further admitted that the said defendant, M. M. Luckhardt, at the time she received and accepted the conveyance of said premises to herself, had no knowledge of the insolvency of her husband, William Luckhardt, nor of his intention or purpose to defraud, hinder or delay his creditors in the collection of their debts by means of said conveyance to her of said real estate; that the defendant had no knowledge of the plaintiff's intention to make her a preferred creditor; and that the reasonable value of the real estate conveyed to her was $1,500."

The contention of the parties to this controversy is this: On the one hand, the trustee claims the conveyance, under finding 10 of the court, is condemned by, and may be avoided under the provisions of, clause "e" of section 67 of the act, which provides "that all conveyances, transfers, assignments or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of this petition, with the intent on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."

The defendant contends, under findings 9 and 12, above quoted, the conveyance was a preference, and having been received by the creditor without knowledge on her part of the insolvency of the debtor, or his intent to hinder, delay and defraud his other creditors, or to prefer her over other creditors, it must be upheld. Clause "b" of section 60 of the act reads: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." Clause "g" of section 57 reads: "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]. Under these provisions of the act, upon the findings made by the court, and viewed alone in the light of a preference only, we are of the opinion the contention of defendant would prevail, but the condemnation of the act does not end here. The clauses quoted from section 57 and section 60 treat alone the subject of preferences. No mention is there made of fraud. The lawmaking power dealt with the subject of fraud in clause "e" of section 67 of the act, and, in language so plain, concise, exact and unequivocal as to leave no room for doubt or construction, there inhibited all transfers of the property of an insolvent debtor made within four months prior to the institution of bankruptcy proceedings under the act wherein the debtor, with the intent on his part of hindering, delaying or defrauding his creditors, parted with his property regardless of the knowledge of or participation in such fraud by the creditor. This is a case of first instance in this state in construing the above provisions of the act. In other jurisdictions a like view of the act has been reached. Friedman v. Verchofsky, 105 Ill. App. 414; Unmack v. Douglass (Conn.), 55 Atl. Rep. 12. There are cases holding a contrary view. Congleton v. Schreihofer (N. J. Ch.), 54 Atl. Rep. 144; Gamble v. Elkin (Pa.) 54 Atl. Rep. 782. However, the reasoning employed in these cases, contrary to the

view expressed in this opinion, does not commend itself to our judgment or meet our approval. Such a construction of the act would nullify one of its most important and beneficial provisions, and, in so far as the act deals with fraudulent transfers of the property of an insolvent debtor, the law would remain the same as before the passage of the act; and this notwithstanding the act prohibits all conveyances, transfers, assignments or incumbrances of the property of the insolvent debtor within four months prior to the filing of the petition in bankruptcy with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, "except as to purchasers in good faith and for a present fair consideration," in which case the estate of the bankrupt to be distributed is not diminished, and also notwithstanding the fact that the act itself avoids all transfers which might be avoided under existing state laws.

It follows, upon the findings made by the trial court, the trustee is entitled to judgment in his favor setting aside the conveyance made. Therefore, the former opinion of this court (65 Kan. 610, 70 Pac. Rep. 702) must be overruled, the judgment below reversed, and cause remanded, with direction to enter judgment in favor of the trustee.

CUNNINGHAM, BURCH and MASON, JJ., concur. JOHNSTON, C. J., and SMITH and GREENE, JJ., dissent from the reasoning and conclusions of this opinion for the reasons stated in the majority opinion on the original hearing.

NOTE. — *Validity of Conveyances Made Within Four Months of Bankruptcy With Intent to Hinder and Defraud Creditors Without Beneficiary's Knowledge of Debtor's Intent.*—Are conveyances made by a debtor to one of his creditors within four months prior to the former's bankruptcy void as to other creditors, when made with a fraudulent intent on the debtor's part, although accepted by the creditor without knowledge of such intent, and without knowledge that a preference was intended? The court in the principal case, shows the uncertainty that inheres in this question by managing to get on both sides of it within a few months and arguing both sides very ably.

We are very free to confess that the court's opinion in the principal case is, to our mind, the only reasonable position that could be taken on a question of this kind. Some courts, in dealing with this question, have lost sight of altogether, the distinction between a preference and a conveyance to hinder, defraud and delay creditors. The first is a payment in the usual course of business; the other is a fraud. In order to invalidate a preference, according to the bankrupt act, it must be shown that the creditor "shall have reasonable cause to believe that it was intended thereby to give a preference." But when it comes to setting aside a conveyance of any of the bankrupt's property made within four months, the rule of law is different and the trustee need only prove the intent of the debtor in making such conveyance to be to "hinder, delay or defraud" his creditors. The two cases are not identical in the least, and the act has very logically and advisedly provided separate remedies therefor. The act, indeed, very sensibly does not impose upon the trustee, in order to set aside a fraudulent conveyance, the same burdens it imposes in cases of mere preferences. Any thoughtful student of law can distinguish the vital distinction between the two cases.

The authorities on this question are not uniform. In the case of Congleton v. Schreihofer (N. J. 1903), it was held that § 67e referred only to transactions which were previously void under the statute of frauds, and hence, a conveyance by a bankrupt to a *bona fide* creditor for a precedent debt, by way of preference, was not invalid thereunder. The court said: "The language used in this section is the same used in the statute of frauds, and I take the section to be intended to reach transactions of the same character and to give to the trustee the same right which creditors had under that statute to set aside fraudulent conveyances. Its language cannot be construed as intended to make acts which were not previously fraudulent against creditors under the bankrupt act." The same result is arrived at by the court in the recent case of Gamble v. Elkin (Pa. 1903), 54 Atl. Rep. 782. In the case of Unmack v. Douglass (Conn. 1903), 55 Atl. Rep. 12, the court holds that under §67e transfers of property made by a bankrupt within four months of the commencement of the bankruptcy proceedings with intent to defraud his creditors are void "except as to purchasers in good faith and for a present fair consideration." In this case, however, the court construed the transaction as coming within the exception mentioned, and further held that the fact that the sale or conveyance may have been on credit did not affect the case. In the case of Friedman v. Verchofsky, 105 Ill. App. 414, the court brings two apparently confusing sections togetner—67e and 70e. The court held that section 70e gives the trustee power to pursue and recover property conveyed by the bankrupt to one not a *bona fide* holder, although the fraudulent conveyance may have been made more than four months prior to the filing of the petition; and that the sole purpose of section 67e is to render null and void all conveyances of property made within four months prior to the filing of the petition, except as to purchasers not only in good faith, but for a present fair consideration.

Cases in which these acts were construed might be referred to as follows: Pledge of property set aside although made more than four months before bankruptcy. *In re* Sheridan, 98 Fed. Rep. 406; *In re* Cobb, 96 Fed. Rep. 821. Mortgage to sureties on appeal bond set aside. *In re* Richards, 95 Fed. Rep. 258. So also as to collateral received by creditors. *In re* Cobb, 96 Fed. Rep. 821; *In re* Ronk, 111 Fed. Rep. 154. Intent of mortgagee immaterial if within prohibited period. Cullinane v. Bank (1902), 91 N. W Rep. 783. Section applies to all tranfers other than money. Blakely v. Bank, 95 Fed. Rep. 267. Conditional sale not void. *In re* Sewell, 111 Fed. Rep. 791. Mortgage to secure present loans and antecedent debts, void only as to the latter. *In re* Wolf, 98 Fed. Rep. 84. Transfers among partners void. *In re* Head and Smith, 114 Fed. Rep. 489. Conveyance of equitable interest to wife not voidable. *In re* Garner, 110 Fed. Rep. 123.

## JETSAM AND FLOTSAM.

### THE ORIGIN OF THE TERM "MAGISTRATE" AS APPLIED TO ENGLISH JUSTICES OF THE PEACE.

According to the etymological and strict meaning of the word "magistrate," it is not equivalent to or synonymous with justice of the peace; nevertheless, it

has come to be so used not only colloquially, but in recognized works. In most dictionaries, one of the meanings invariably given to "magistrate" is "justice of the peace," although it is not so in Johnson's dictionary. In older books and statutes the term "magistrate" is rarely, if ever, applied to justices of the peace, and then only in the sense that they are one class of the magistracy or the country, which embraces all officers of the state, beginning with the chief magistrate, who is the sovereign, and ending with the constable. Such is the use of the word by Blackstone.

The term "magistrate" in its original meaning denoted, according to the dictionaries, "a public civil officer invested with the executive government or some branch of it." It is, of course, derived from the Romans, who used it to denote a person who determined and enforced the law rather than a judge who ascertained the facts. In later Roman times the offices of judge and magistrate became united. It is in that sense an older and much wider term than our justice; but it does not appear to have been much used in early English times, at least to describe our judicial officers, for whom the term "justitia" or "justiciar" or "justice" was used.

For many years the head official in the state was called a "justiciar," but he afterwards gave place to the chancellor, his judicial duties, in the thirteenth century, passing to the lord chief justice. Every one else who administered the law seems to have been described as a justiciar or justice. There were "justices in eyre," "justices of assize," "of oyer and terminer," and others. The local administrators of the law were also justiciars or justices. Henry I., by a charter, gave the county of Middlesex to London "to ferm," with the right to appoint their own justiciars, and the aldermen of the city of London were also described as justiciars. The appointment of persons in each county as conservators of the peace dates at least from the beginning of the reign of Edward III., while the term "justice of the peace" was first used in 34 Edw. III, c. 1, when they were first given the power to try felonies.

It is rather difficult to trace the history of the application of the word "magistrate" to describe a justice of the peace. We are inclined to think that it is only within recent years that the two have been used as equivalent, for while a justice of the peace was always, properly speaking, a magistrate, so also were all the other judges; but every magistrate was not a justice of the peace. It is curious, therefore, to find both in dictionaries and encyclopedias the term "magistrate," now described as being usually restricted to justices of the peace in the county and to police and stipendiary magistrates in London and in the large towns. In Scotland it is not usual to describe the county justices as magistrates; but the name is reserved more particularly for the provost and bailies in burghs. Probably this was the same in England at one time, for in the 29th edition of Burn's Justice of the Peace, published in 1845, it is stated "that the appellation 'justice' is usually applied to persons in the commission of the peace for counties, etc., 'magistrate' to persons exercising similar authority under charter, as in cities, boroughs, etc." This distinction was not drawn in the edition of 1756.

If we might hazard a surmise we would suggest that the use of the word "magistrate" as applicable to justices of the peace arose in connection with the paid justices of the peace in London, for they are the first justices whom we find described as magistrates in the statute book. With the exception of Bow street police court, these were instituted in 1792, under 32 Geo. III. c. 53. By that act it was provided that seven public offices in or near the metropolis in Middlesex and Surrey were to be established, and three justices of the peace were to be appointed to attend these regularly to execute the office of a justice of the peace. A salary was provided for them. They were only called justices in that act, and the term "magistrates" was not applied to them. However, they had powers which a justice had not, namely, they were enabled to retain and employ a number of men to act as constables.

Prior to that date there was some sort of police court at Bow street, which was then as it is now, in the city of Westminster. There were evidently justices of the peace who sat regularly in Westminster, and one place at which they sat was in Bow street. They appear to have received something in the nature of a salary from the fees which were taken, and which they shared with their clerk. The office appears to have been at one time much abused by some of the justices, who accepted money from offenders. These were known as trading justices, and were much looked down upon. Fielding, in his novel of Amelia, satirizes severely the abuse of this office by such justices. He says: "To speak the truth plainly, the justice was never indifferent in a cause but when he could get nothing on either side." Fielding himself was one of these justices for Westminster, and to him and to his half-brother, Sir John Fielding, London and the country owes a considerable debt for their labors to reform the constabulary of the time. The Bow street runners of their day became famous.

Even at this time the expression "magistrate" was used to describe these justices who sat in Westminster. Fielding, in Amelia, describing "Jonathan Thrasher, Esq., one of the justices of the peace for that liberty," that is, Westminster, says that he "had some few imperfections in his magisterial capacity." And in the *Annual Register* for 1762, in the notice of the life of Fielding, we find it stated that he "was obliged, therefore, to accept the office of an acting magistrate in the commission of the peace for Middlesex, with a yearly pension out of the public service money," so that it is clear that the word was then in common use to describe certain justices of the peace.

In 1839 parliament applied the term "magistrate" to all the paid justices of the metropolis, in the metropolitan police courts act of that year. (2 & 3 Vict. ch. 71.) Section 1 enacts that the several persons appointed to execute the duties of a justice of the peace at the various police offices in the metropolis "shall continue to exercise the same there, and shall be justices of the counties of Middlesex, Surrey, Kent, Essex and Hertfordshire, the city and liberty of Westminster, and the liberty of the Tower of London, and *magistrates* of the said courts," and throughout the act they are referred to as magistrates. In the act of the following year, 3 & 4 Vict. ch. 84, they are described as "police magistrates." The Municipal Corporations Act, 1835, in giving power to municipal corporations to obtain paid justices, also describes them as "salaried police magistrates." It seems clear, therefore, that the word is now generally applicable to describe all paid justices, and by analogy it has come to be extended to unpaid justices of the peace not only in the towns, but in the counties.—*The Justice of the Peace.*

## BOOK REVIEWS.

### HAMILTON'S CYCLOPEDIA OF NEGLIGENCE CASES.

The fecundity of legal invention is one of the marvels of the present age. Indeed, if our old friend Lord Coke, could rise from the grave and be given the power to compass in one comprehensive glance the whole field of legal literary invention, the wonderful immensity and brilliancy of the achievements of these latter days would overwhelm even his vivid imagination. For indeed, no man in Lord Coke's day looked further into the future of the law than he did, nor was there any existing work on the law that made any claim to an equal place as authority with his own commentaries upon Lyttleton, and yet even he could hardly have dreamed, in his most imaginative moments, the ultimate results of the current which his own literary activity set in motion.

A still further advance has been made in the appearance of the recent work entitled "A Cyclopedia of Negligence Cases, by T. F. Hamilton of the New York bar." This work contains all the reported New York cases on the subject of negligence, classified according to the facts, that is, all cases having similar facts are grouped together under some appropriate catch-word or suggestive phrase. This work, therefore, is a monument in the law; it establishes a new era, being at the present time the only work classifying negligence cases strictly according to the facts.

While the work has to do only with New York cases, yet these cases are so numerous and so well considered as to be very persuasive authority in every state especially on questions which come up in such states for the first time.

Printed in one volume of nearly 1200 pages and published by Baker, Voorhis & Co., New York.

### CYCLOPEDIA OF LAW AND PROCEDURE. VOLUME 10.

If the publishers of the new and incomparable Cyclopedia of Law had bequeathed to the profession nothing more than volume ten of that series they would have put the profession under the heaviest obligations. This volume treats only of one subject of the law, a subject of the first and highest importance—that of corporations. Indeed, within the compass of the one thousand three hundred and sixty-three pages consumed by the treatment of this subject we have practically an exhaustive treatise compressed into narrow and concise limits. The author of this article is none other than that prince of modern law text writers, Hon. Seymour D. Thompson, at one time editor of the CENTRAL LAW JOURNAL.

The simple announcement of the appearance of this volume would be sufficient of itself to command the immediate attention and interest of every practicing lawyer and every jurist and law student interested in the subject of corporations. Mr. Thompson has long been regarded as a high authority on the subject of corporations, and as a luminous and pungent text writer, no modern author even approaches him in clearness of diction and directness of statement. While exceptions might sometimes be taken by ultra conservatives to what are styled Mr. Thompson's occasional exaggerations, it cannot be denied that there is never any obscurity or indirectness in his statements. A glance, for instance, through the pages of this excellently prepared article on corporations evidences the grasp of a master mind, who can see into every nook and crevice of his subject at a glance and the occasional flashes of juridical intemperance, if such it might be called, only betray that deep-seated indignation of a man of genius at the attempted imposition of error, or the careless disregard of important principles by some legally recognized or self-asserted oracle of the law. Error can find no place of concealment or retrenchment before a man whose knowledge of the principle of his subject has ripened nto such a close intimacy that he can detect the slightest departure from principle almost intuitively.

In speaking more particularly of the value of Mr Thompson's work on this article, we find that it possesses in a high degree those excellences which the active practitioner demands in every legal treatise—accessibility of arrangement, clearness and conciseness of statement, and exhaustive citation and consideration of the authorities.

Published by The American Law Book Company, New York.

## BOOKS RECEIVED.

Street Railway Reports Annotated (Cited St. Ry. Rep.) Reporting the Electric Railway and Street Railway Decisions of the Federal and State Courts in the United States. Edited by Frank B. Gilbert, of the Albany Bar. Vol. 1. Albany, N. Y. Matthew Bender, 1904. Sheep, price $5.00. Review will follow

## HUMOR OF THE LAW.

The simple, lucid style in which a learned lawyer may question a witness is illustrated by the following verbatim fragment from the English law courts as reported by the St. James Gazette: King's counsel (examining witness)—"Did you—I know you did not, but I am bound to put it to you—on the 25th—it was not the 25th really, it was the 24th—it is a mistake in my brief—see the defendant—he is not the defendant really; he is the plaintiff—there is a counterclaim, but you would not understand that—yes or no?" Witness. "What!"

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**

1. ABATEMENT AND REVIVAL — Nonsuit to Defendant Not Setting up Construction. — A plaintiff has a right to take a nonsuit as to defendants who have set up no counterclaim —Tennessee River Land & Timber Co. v. Butler, N. Car., 45 S. E. Rep. 956.

2. ABATEMENT AND REVIVAL—Other Action Pending.—Pendency of an action against a person for the publication of a libel on one day is no ground for abating a suit against another for causing the publication of the same article on the same day and on other days. — Holmes v. Clisbey, Ga., 45 S. E. Rep. 684.

3. ACKNOWLEDGMENT — Impeaching Notary's Certificate.—The burden of impeaching the notary's certificate in a deed held on the party claiming that it is false. —Langenbeck v. Louis, Cal., 73 Pac. Rep. 1066.

4. ALIENS—Will Affecting Real Property.—Real property within the state passes under the provisions of the will of a foreign testator.—*In re* Barandon's Estate, 84 N. Y. Supp. 937.

5. APPEAL AND ERROR — Amendment of Pleadings on Appeal.—In action against a city for damages arising from overflowing of a stream into which was discharged sewage and drainage water, held, that the complaint could not be amended on appeal so as to conform to the theory on which the case was tried and decided.—Smith v. City of Auburn, 84 N. Y. Supp. 725.

6. APPEAL AND ERROR — Jurisdiction of Courts. — Where an order of a court assuming to act under the special jurisdiction conferred by a statute goes beyond the scope of the court's limited authority an appeal lies.—Travers v. Dean, Md., 56 Atl. Rep. 388.

7. APPEAL AND ERROR—Misconduct of Jurors Inspecting Gate.—Misconduct of jurors in making inspection of a gate on one of defendant's street cars, during progress of the trial of an action for personal injuries, held harmless.—Gans v. Metropolitan St. Ry. Co., 84 N. Y. Supp. 914.

8. APPEAL AND ERROR—Presumption as to Issue on Which Judgment is Based.—Where a judgment may have been rendered on either of two issues, one of which was insufficiently established, the court on appeal will not assume that it was based on the other issue. — M. S. Huey Co. v. Rothfeld, 84 N. Y. Supp. 883.

9. APPEAL AND ERROR—View by Jury Within Court's Discretion.—The allowance of a view is peculiarly within the discretion of the trial court, and its refusal is not ground of reversal unless clearly prejudicial to the party asking it. — Davis v. American Telephone & Telegraph Co., W. Va., 45 S. E. Rep. 926.

10. ARBITRATION AND AWARD — Impeaching Award.—The admissions of an arbitrator, made after filing his award, are not admissible to impeach the award.—Manson v. Wilcox, Cal., 73 Pac. Rep. 1004.

11. ATTORNEY AND CLIENT—Extent of Attorney's Lien. —Under Code Civ. Proc. § 66, relative to attorney's liens, such lien held to attach to proceeds of judgment in hands of sheriff, and to be superior to right of defendant to set off judgment obtained by him against plaintiff.—Barry v. Third Ave. R. Co., 84 N. Y. Supp. 830.

12. BAIL—Necessity of Personal Appearance at Trial for Misdemeanor.—Where one accused of a misdemeanor has appeared and pleaded, his failure to be present personally and plead when his case is called for trial is not ground for forfeiture of his bail bond. — People v. Welsh, 84 N. Y. Supp. 703.

13. BANKS AND BANKING—Power to Lease Property.—A national bank has power to lease property for its occupancy in conducting its business for a term extending beyond the expiration of its charter, even though the lease is assignable only by consent of the lessor.—Weeks v. International Trust Co., U. S. C. C. of App., First Circuit, 125 Fed. Rep. 370.

14. BILLS AND NOTES—Consideration. — Consent of a bank to transfer of certain property to corporation held a sufficient consideration to support notes given by the corporation to the bank to retire notes of the transferror held by the bank.—Flour City Nat. Bank v. Shire, 84 N. Y. Supp. 810.

15. BROKERS—Misrepresentations as Affecting Right to Commissions.—Where a real estate broker is guilty of any misrepresentation or deception which induces the principal to contract for the sale, he cannot recover commissions.—Whaples v. Fahys, 84 N. Y. Supp. 793.

16. BUILDING AND LOAN ASSOCIATIONS—Withdrawal of Dues.—In an action by member against building association to recover dues, held, that he must show existence of fund from which they might be withdrawn under the certificate and by-laws. — Ronca v. New York Building Loan Banking Co., 84 N. Y. Supp. 879.

17. COLLEGES AND UNIVERSITIES — Impairment of Charter Obligation.—The contractual dignity of a corporate charter, which prevents the powers thereby conferred from being impaired by subsequent legislation, does not require additional powers conferred by a subsequent charter to be interpreted in accordance therewith.—Phœnix v. Trustees of Columbia College, 84 N. Y. Supp. 897.

18. CONSTITUTIONAL LAW — Determining Validity of Statute.—The validity of statutes must be determined solely with reference to constitutional restrictions, and not by natural equity or justice. — Viemeister v. White, 84 N. Y. Supp. 712.

19. CONSTITUTIONAL LAW — Due Process of Law in Local Improvements.—Due process of law held not denied an abutting owner because two of the members of board levying assessments for local improvement were abutting owners.—Hibben v. Smith, U. S. S. C., 24 Sup. Ct. Rep. 88.

20. CONSTITUTIONAL LAW—Reduction of Sentence.—Cr. Code, § 509*a*, providing that the supreme court may reduce an excessive sentence, is not in violation of the constitution, forbidding the exercise by the judiciary of any power belonging to the executive branch. — Palmer v. State, Neb., 97 N. W. Rep. 285.

21. CONSTITUTIONAL LAW—Validity of Statute Authorizing Substituted Service. — Civ. Code, § 51, subd. 6, authorizing substituted service on nonresidents, does not violate Const. U. S. art. 4, § 2, guarantying to citizens of each state the privileges and immunities of those of the several states.—Guenther v. American Steel Hoop Co., Ky., 76 S. W. Rep. 419.

22. CONTEMPT—Objections Not Made Below. — Objection should be made below, in contempt proceeding for disposal of property by a debtor after service of order on him for his examination, that the allegations as to the service were not sufficiently specific. — Oshinsky v. Gottlieb, 84 N. Y. Supp. 871.

23. CONTRACTS — Corporation's Right to Aid Town in Building Bridge.—Contract of corporation, owning suburban property, to pay a portion of the cost of a bridge to be erected by a town, held not contrary to public policy.—Board of Trustees of Charlotte Tp. v. Piedmont Realty Co., N. Car., 45 S. E. Rep. 959.

24. CORPORATIONS — Intent of Transferee of Stock.—Whether, by a transfer of stock not entered on the books of a corporation, the owner intended to part with the title, is a question of intent.—Maxwell v. Foster, S. Car., 45 S. E. Rep. 927.

25. CORPORATIONS — Salary of Officers. — A court of equity held empowered to review the reasonableness of salaries fixed by stockholders of a corporation. — Lillard v. Oil, Paint & Drug Co., N. J., 56 Atl. Rep. 254.

26. COSTS—Refusal to Tax.—A taxing officer cannot refuse to tax costs for findings, though unduly voluminous, drawn under direction of the trial judge. — Lentz v. Eimermann, Wis., 97 N. W. Rep. 181.

27. COSTS—Transcript of the Record. — Under Code, §§ 540, 968, costs of making transcript on appeal held not to abide the final result in the lower court, but to be costs to which the successful party on appeal is entitled.—Dobson & Whitley v. Southern Ry. Co., N. Car., 45 S. E. Rep. 958.

28. COURTS—Dismissal of Action. — While a judge is not authorized, after evidence for the prosecution, to summarily discharge the jury and discharge the defendants, yet, if he does, it will bar another prosecution for the same offense. — Schrieber v. Clapp, Okla., 74 Pac. Rep. 316.

29. CRIMINAL EVIDENCE — Admissibility. — Independent facts tending to prove defendant guilty of other collateral crimes to show the likelihood of his guilt or to discredit him as a witness is inadmissible. — State v. Hendrick, N. J., 56 Atl. Rep. 247.

30. CRIMINAL EVIDENCE—Declarations.—Declarations of accused, prior to the commission of a crime, in his own favor, forming no part of the *res gestæ*, are inadmissible —Fields v. State, Fla., 35 So. Rep. 185.

31. CRIMINAL EVIDENCE — Validity of Indictment. — Where a criminal case is removed to another court, the indictment is held a part of the record and unimpeachable by parol evidence.—Hooker v. State, Md., 56 Atl Rep. 390.

32. CRIMINAL LAW—Availability of Writ of Error. — A writ of error *coram nobis* is not available to review an adjudicated question of fact open to review on a motion for new trial or on appeal.—Hamlin v. State, Kan., 74 Pac. Rep. 242.

33. CRIMINAL LAW—Change of Venue.—Where a criminal cause is regularly removed from one county court to another, it is erroneous to return it to the original court, unless the order of return be made by consent of the state and the defendant, or is based on affidavits and a proper finding of fact by the court. — State v. Ledford, N. Car., 45 S. E. Rep. 944.

34. CRIMINAL LAW — Larceny by Bailee. — Where a bailee obtains lawful possession of property without intent to appropriate it to his own use, he cannot commit larceny.—Finlayson v. State, Fla., 35 So. Rep. 203.

35. CRIMINAL LAW—Reasonable Doubt. — A reasonable doubt, sufficient to prevent a conviction for crime, is such a doubt as reasonable and fair minded men, after carefully considering all the testimony, would entertain.—State v. Walls, Del., 56 Atl. Rep. 111.

36. CRIMINAL TRIAL—Absence of Defendant in Misdemeanor Case.—Under Code Cr. Proc. § 356, trial of a misdemeanor may be had in the absence of the defendant, if he appear by counsel, notwithstanding sec. 8, relating to rights of defendants.—People v. Welsh, 84 N. Y. Supp. 703.

37. CRIMINAL TRIAL—Affidavit of Prejudice Necessary to Incorporate Questions and Answers in Record. — The claim of appellant in a criminal case that the record should contain the testimony by questions and answers, on the ground that he was prejudiced by the examination of certain witnesses by the recorder, cannot be considered, unless such facts are made to appear by affidavit.—People v. Childs, 84 N. Y. Supp. 858.

38. CRIMINAL TRIAL—Continuance.—Defendant having been diligent, continuance should have been granted for absence of a witness whose testimony, it was claimed, would have shown that the shooting was after a demonstration by deceased to draw a gun.—Poole v. State, Tex., 76 S. W. Rep. 565.

39. CRIMINAL TRIAL—Presumptions.—Proof of motive does not establish guilt, nor proof of want of motive establish innocence.—Cupps v. State, Wis., 97 N. W. Rep. 210.

40. CRIMINAL TRIAL—Private Conference with Judge. —Trial judges should not permit private conferences with them in respect to any issue arising on the trial of a criminal cause.—Peaden v. State, Fla., 35 So. Rep. 204.

41. DAMAGES — Excessiveness. — Where the evidence shows that a boy of 14 years was so seriously injured that an amputation of his right foot was necessary, a verdict of $7,750 was not excessive. — Perry v. Tozer, Minn., 97 N. W. Rep. 137.

42. DAMAGES—Motion Based Upon Stenographer's Minutes.—A motion to vacate an assessment of damages may be based upon the stenographer's minutes, if there is no question as to their correctness; the case and exceptions not being absolutely indispensable.—City Trust, Safe Deposit & Surety Co. v. American Brewing Co., 84 N. Y. Supp. 771.

43. DEEDS—Drunkenness.—A person addicted to the habitual use of intoxicants is not incompetent to contract and convey property, unless it appears that actual intoxication had dethroned his reason, or so impaired his understanding as to render him mentally unsound, when the act was performed.—Burnham v. Burnham, Wis., 97 N. W. Rep. 176.

44. DEEDS—Records as Affected Division of County.—Where deeds are recorded in the county where the land is situated, on division of county, it is not necessary that the deeds should be registered in the new county.—Bivings v. Gosnell, N. Car., 45 S. E. Rep. 942.

45. DISCOVERY — Amount Due Under Contract. — A plaintiff is not entitled to an order for an inspection of defendant's books to discover the amount due him under a contract.—Martin v. New Trinidad Lake Asphalt Co., 84 N. Y. Supp. 711.

46. EJECTMENT—Burden of Proof.—Where, in an action to recover land, plaintiff alleges title, possession of a portion, and wrongful withholding, and defendant denies the entire complaint, the burden is on plaintiff to prove the allegation.—Bivings v. Gosnell, N. Car., 45 S. E. Rep. 942.

47. EJECTMENT—Notice of Title Bond.—A defendant in ejectment, who claims to have lost a title bond relied on, which he alleges plaintiffs had notice of, is entitled to have the issue of notice tried, though the bond is not produced.—Burkhart v. Loughridge, Ky., 76 S. W. Rep. 397.

48. EJECTMENT—Time for Filing Defense Bond.—Where plaintiffs failed for over three years to endeavor to obtain compliance with order requiring defendants to give a defense bond, their delay held a waiver, authorizing the court to grant defendants further time to file the bond —Tennessee River Land & Timber Co. v. Butler, N. Car., 45 S. E. Rep. 956.

49. ELECTIONS—Knowledge of Rights.—The doctrine of election held to have no application to claiming under a will and under a right of survivorship.—Parkey v. Ramsey, Tenn., 76 S. W. Rep. 812.

50. ELECTRICITY—Duty to Licensee.—A telephone company, negligently maintaining a wire over the metal roof of a store, held to owe no duty to a person taking refuge under the roof from an electric storm, who was killed by lightning conducted thence by such wire.—Cumberland Telegraph & Telephone Co. v. Martin's Admr., Ky., 76 S. W. Rep. 394.

51. ELECTRICITY—Manholes in Street.—One may not drive an extraordinarily heavy load over manholes in a street which he has noticed are not strong enough there for, he having ample room to pass by, instead of over them —Missouri Edison Electric Co. v. Weber, 76 S. W. Rep. 736.

52. EMBEZZLEMENT—Evidence of Affairs at Bank After Defendant Left State.—On trial of the president of a bank for embezzlement, evidence of certain bank affairs after he had left the state held admissible. — State v. Dix, Wash., 74 Pac. Rep 570.

53. EMINENT DOMAIN—Evidence of Value. — Jury, on trial *de novo* on appeal in condemnation proceedings,

must be satisfied as to the value and damage by evidence produced before them, without reference to the testimony before commissioners.—Sharp v. United States, U. S. S. C., 24 Sup. Ct. Rep. 114.

54. ESTOPPEL—Effect of Part Payment on Balance.—A mere payment by one of part of a debt for which he is not legally bound held not to estop him to deny liability for the balance.—O'Malley v. Wagner, Ky., 76 S. W. Rep. 356.

55. ESTOPPEL—Rights of Widow.—A widow, having the right of survivorship in certain property, held not estopped from asserting it because she had claimed under a will in ignorance of her rights.—Parkey v. Ramsey, Tenn., 76 S. W. Rep. 812.

56. EVIDENCE — Privileged Communications. — In an action for personal injuries, evidence relating to other patients of the physician treating plaintiff and testifying for her, and as to what they did and as to what records he kept, held inadmissible.—Deutschmann v. Third Ave. R. Co , 84 N. Y. Supp. 887.

57. EVIDENCE—What Constitutes Quorum —In the absence of evidence as to the number of members necessary to constitute a quorum of the executive committee of a corporation, a majority is to be deemed sufficient.—Marshall v. Industrial Federation of America, 84 N. Y. Supp. 866.

58. EXECUTION—Domestic's Wages.—Female domestic servant held within Municipal Court Act, Laws 1902, p. 1569, ch. 580, § 274, authorizing execution against the person in action for wages by laborers, etc.—Greenberg v. Lacoy, 84 N. Y. Supp. 980.

59. EXECUTORS AND ADMINISTRATORS—Contract to Sell Realty.—Executors held liable as such for money paid to them by prospective purchasers under contract for sale of testator's real estate, title to which failed.—Cariedo v. Austin, 84 N. Y. Supp. 777.

60. EXECUTORS AND ADMINISTRATORS—Lease of Real Estate to Pay Debts.—Where intestate's real estate was rented by an administrator to pay debts, the rent accruing under the lease belonged to the heirs.—Vance v. Vance's Admr., Ky., 76 S. W. Rep. 370.

61. EXECUTORS AND ADMINISTRATORS — Reimbursing Husband for Sepulture of Wife.—A husband who has necessarily paid for his wife's sepulture is entitled to reimbursement out of her estate.—Pache v. Oppenheim, 84 N. Y. Supp. 926.

62. EXECUTORS AND ADMINISTRATORS — Removal on Ground of Absence.—Continuous absence of executrix during the year after her appointment held not ground for her removal.—*In re* Magoun, 84 N. Y. Supp. 940.

63. EXECUTORS AND ADMINISTRATORS—Right to Cut Timber from Estate.—Where the will gave the executors no power to cut timber from the land, they should be charged with the value of any cut.—Finley's Exrs. v. Pearson, Ky., 76 S. W. Rep. 374.

64. FALSE IMPRISONMENT—Peace Officer's Liability for Exemplary Damages.—Exemplary damages may be recovered of a peace officer for false arrest and imprisonment, when such officer acted maliciously.—Marshall v. Cleaver, Del., 56 Atl. Rep. 380.

65. FEDERAL COURTS — Jurisdiction. — The question whether a federal court has authority to administer a trust estate after a suit begun in the state court held not to involve jurisdiction of circuit court as a federal tribunal.—Louisville Trust Co. v. Knott, U. S. S. C., 24 Sup. Ct. Rep. 119.

66. FEDERAL COURTS—Remedy at Law.—Lack of adequate remedy at law cannot be urged to sustain federal jurisdiction of a suit to cancel an insurance policy for fraud, when insurance company by diversity of citizenship might remove the action on such policy to a federal court.—Cable v. United States Life Ins. Co., U. S. S. C., 24 Sup. Ct. Rep. 74.

67. FIRE INSURANCE—Indorsement on Policy.—Where fire policies are pledged by the insured, andbear an indorsement appointing the pledgee to receive a portion of the money in case of a loss, the pledgee is entitled to receive such moneys, though he has no insurable interest in the property.—Baughman v. Camden Mfg. Co., N. J., 56 Atl. Rep. 376.

68. FIRE INSURANCE—Removal of Property.—That the insurer consented to the removal of the insured property before the fire may be shown by acts and conduct of the adjuster after the loss.—Montgomery v. Delaware Ins. Co., S. Car., 45 S. E. Rep. 934.

69. FRAUDS, STATUTE OF—Debt of Another.—Promise by creditor to secured creditor to take property and pay latter's debt held not within statute of frauds.—Simpson v. Carr & Parrigin, Ky., 76 S. W. Rep. 346.

70. FRAUDS, STATUTE OF—Description of Property in Memorandum.—The description of a house by street and number in a town, in a memorandum for its sale, held sufficient within the statute of frauds.—Claphan v. Barber, N. J., 56 Atl. Rep. 370.

71. FRAUDS, STATUTE OF—Part Performance.—Where a parol agreement for the sale of land is made between relatives, the vendee's possession and the construction of valuable improvements on the land held a sufficient part performance to take the contract out of the statute of frauds.—Pugh v. Spicknall, Oreg., 73 Pac. Rep. 1020.

72. FRAUDS, STATUTE OF—Part Performance.—To take a case out of the statute of frauds on the ground of part performance, all acts done thereunder must be referable exclusively to the contract.—Seitman v. Seitman, Ill., 68 N. E. Rep. 461.

73. GARNISHMENT—Receipt by Garnishee. —A receipt given by a garnishee to the sheriff held to sufficiently show that the sheriff had possession of the property receipted for in his official capacity.—Colbath v. Hoefer, Oreg., 73 Pac. Rep. 10.

74. GRAND JURY—Indictment not Concurred in by Majority.—In a criminal prosecution, evidence by members of the grand jury tending to show that an indictment was not concurred in by a majority of that body is inadmissible.—Hooker v. State, Md., 56 Atl. Rep. 390.

75. GUARDIAN AND WARD—Appointment of Widow.—Widow will be appointed guardian of her minor children where no sufficient reasons to the contrary are shown.—*In re* Burdick, 84 N. Y. Supp. 932.

76. HIGHWAYS—County Court's Right to Let Contract for Repairs.—A county court has no authority to let contracts concerning the repairs of public roads.—Perry County v. Engle, Ky., 76 S. W. Rep. 382.

77. HOMESTEAD — Unconditional Sale and Abandonment.—An unconditional sale of homestead of a deceased wife at the instance of the surviving husband amounts to an abandonment thereof.—Clay's Guardian v. Wallace, Ky., 76 S. W. Rep. 388.

78. HOMICIDE—Chastity of Deceased.—On a trial for murder by procuring deceased to take poison, evidence as to deceased's chastity in the community in which she lived held inadmissible; it not being in issue.—Burnett v. People, Ill , 68 N. E. Rep. 505.

79. HUSBAND AND WIFE—Alienation of Affections.—An agreement of husband and wife, on separating, held not to bar action by her for alienation of his affections.—Jenkins v. Chism, Ky., 76 S. W. Rep. 405.

80. HUSBAND AND WIFE—Counsel Fees in Action for Separation. —Allowance of counsel fees to plaintiff in an action for separation, for purpose of further prosecution of the action, after a disagreement of the jury on the trial of an issue whether there was a marriage, held proper.—Herrmann v. Herrmann, 84 N. Y. Supp. 736.

81. INDICTMENT AND INFORMATION—Sufficiency of Evidence on Which to Found Indictment.—The decision, on *habeas corpus*, that the evidence before the magistrate was sufficient to warrant holding the accused, held to render unavailing the claim that the same evidence was insufficient on which to found an indictment.—People v. Martin, 84 N. Y. Supp. 823.

82. INJUNCTION—Enjoining Enforcement of Invalid Law.—A court of equity, state or federal, has jurisdiction to enjoin the enforcement of an invalid law, when its enforcement would cause loss of business, expense and hardships to complainant, and result in irreparable injury.—Greenwich Ins. Co. v. Carroll, U. S. C. C., N. D. Ill., 125 Fed. Rep. 121.

83. INJUNCTION—Interference with Employees.—Injunction to restrain interference with plaintiff's business by a union, the members of which had struck because plaintiff had refused to employ only union men, will not be vacated.—W. P. Davis Mach. Co. v. Robinson, 84 N. Y. Supp. 837.

84. INJUNCTION—Removal of Fence.—One who had erected a fence on an alleged boundary, which fence had been removed by the other owner, in peaceable possession, held not entitled to seek an injunction.—Currier v. Jones, Iowa, 96 N. W. Rep. 766.

85. INJUNCTION—When Denied.—An injunction will not be granted, when the right to maintain the action is denied, unless the petitioners show that they are legally authorized to prosecute the action and are entitled to the relief prayed.—School Dist. No. 112 of Garfield County v. Goodpasture, Okla., 74 Pac. Rep. 501.

86. INTOXICATING LIQUORS—Delivery of Bond Without Signature.—An indemnity bond, delivered with agreement that the secretary of the surety company would afterwards sign it, but with knowledge of his limited authority, held not binding, not having been signed till after an act making its penalty payable.—Cullman v. Bowker, 84 N. Y. Supp. 698.

87. JUDGMENT—Effect of Appeal.—A decree of the United States Circuit Court, from which an appeal is pending, is not *res judicata* of matters involved in a suit in a state court.—Hennessy v. Tacoma Smelting & Refining Co., Wash., 74 Pac. Rep. 584.

88. JUDGMENT—Full Faith and Credit.—Illinois judgment held not denied full faith and credit by Code Civ. Proc. N. Y. § 1780, forbidding maintenance of action on such a judgment by one foreign corporation against another.—Anglo-American Provision Co. v. Davis Provision Co., U. S. S. C., 24 Sup. Ct. Rep. 92.

89. JUDGMENT—Suing on Policy of Party Whose Name is Accidentally Changed.—Where policy on wife's property was made out by mistake in name of husband, that he sued on the policy held not to bar an action by the wife.—Montgomery v. Delaware Ins. Co., S. Car., 45 S. E. Rep. 934.

90. JUSTICE OF THE PEACE—Delay in Transmission of Papers.—The failure of a justice of the peace to transmit papers to the clerk of district court within the time required by statute held not ground for dismissal of the appeal.—Goodrich v. Peterson, Wyo., 74 Pac. Rep. 497.

91. LANDLORD AND TENANT—Trespass and Ejectment—In an action of trespass and ejectment by a landlord against a tenant, a declaration which alleges the relation is sufficient, without any allegation as to the nature of plaintiff's estate in the premises.—Ayotte v. Johnson, R. I., 56 Atl. Rep. 110

92. LIFE INSURANCE—Effect of Assured's Bankruptcy.—Assured's bankruptcy held not to extend time for demanding paid up policy.—Equitable Life Assur. Soc. v. Warren Deposit Bank, Ky., 76 S. W. Rep. 391.

93. LIMITATION OF ACTIONS—Amendment of Declaration.—An amendment of declaration in action for wrongful death of servant held not statement of a new cause of action, so as to bar the action, though limitations had intervened between death and date of amendment.—State v. Chesapeake Beach Ry. Co., Md., 56 Atl. Rep 385.

94 LIMITATION OF ACTIONS—Conversion of Trust Estate.—A tenant by the curtesy, who in his wife's lifetime occupied as her trustee, is presumed to hold in the same capacity after her death.—Williams v. Williams' Ex'r, Ky., 76 S. W. Rep. 413.

95. MANDAMUS—Disqualification of Judge.—*Mandamus* will issue to compel a judge, who has been of counsel for a party, to change venue of case.—Gamble v. First Judicial Dist. Court, Nev., 74 Pac. Rep. 530.

96. MASTER AND SERVANT—Assumed Risk.—The risk of the falling of a stone on which plaintiff was working held an obvious risk, which plaintiff assumed.—Archambault v. Archambault. Mass., 68 N. E. Rep. 199.

97. MASTER AND SERVANT—Belt Shifters.—Failure of a master to provide belt shifters, etc., does not create statutory liability, under Factory Act April 27, 1899, § 9 (Burns' Rev. St. 1901, § 7087i), unless the same have been ordered by the inspector.—Indiana Mfg. Co. v. Wells, Ind., 68 N. E. Rep. 319.

98. MASTER AND SERVANT—Contributory Negligence.—An employee, who noticed a defect in the premises and reported same to master, held not guilty of contributory negligence in continuing work on a promise to repair.—Leaux v. City of New York, 84 N. Y. Supp. 511.

99. MASTER AND SERVANT—Independent Contractor.—The employment of an independent contractor to make an excavation adjacent to an abutting owner's wall does not relieve the proprietor from the obligation to give the adjacent owner timely notice of the nature and extent of the intended excavation.—Davis v. Summerfield, N. Car., 45 S. E. Rep. 654.

100. MASTER AND SERVANT—Independent Contractor.—An elevator company, contracting to place an elevator in running order in a building at a definite price, without any direction or control by the owner of the building in doing the work, is an independent contractor.—Parkhurst v. Swift, Ind., 68 N. E. Rep. 620.

101. MUNICIPAL CORPORATIONS—Burden of Showing Negligence.—Burden of proof in action against a city for damages for personal injuries, alleged as resulting from its negligence, held to be on plaintiff to show negligence.—Jarrell v. City of Wilmington, Del., 56 Atl. Rep. 379.

102. MUNICIPAL CORPORATIONS—Liability for Acts of City Engineer.—A city is liable for the wrongful or negligent acts of its engineer, done in the course of his official duties, with reference to the improvement of the streets of the city.—Normile v. City of Ballard, Wash., 74 Pac. Rep. 566.

103. MUNICIPAL CORPORATIONS—Negligence of City and Independent Person.—Where negligent acts of city and another independent person have between them caused damage to a third, held that the sufferer is entitled to sue anyone of them.—Jarrell v. City of Wilmington, Del., 56 Atl. Rep. 379.

104. MUNICIPAL CORPORATIONS—Prosecution and Conviction Under Void Ordinances.—A person prosecuted and convicted for a violation of an unconstitutional ordinance, enacted in accordance with the legislative policy of the state as expressed by Laws 1899, p. 41, held not entitled to maintain an action against the city for damages thereby sustained.—Simpson v. City of Whatcom, Wash., 74 Pac. Rep. 577.

105. MUNICIPAL CORPORATIONS—Public Lighting Contract.—Under Priv. Laws 1903, pp. 140, 146, ch. 85, 86, both of which grant power to the commissioners of the town of Concord to contract for public lighting, but the latter making an election a prerequisite to the exercise of such power, held, that letting contract without election was invalid act.—Wadsworth v. City of Concord, N. Car., 45 S. E. Rep. 948.

106. NEGLIGENCE—Helper on Wagon.—A finding that the negligence of the driver of an ice wagon, with which a street car collided, was not imputable to a helper riding on the wagon, held not against the evidence.—Murray v. Metropolitan St. Ry. Co., 84 N. Y. Supp. 876

107. PARTNERSHIP—Effect of Dissolution on Liability of Partners.—Individual partners, on dissolution of firm, are liable for debts, unless released by valid agreement of creditor founded on new consideration.—Bronx Metal Bed Co. v. Wallerstein, 84 N. Y. Supp. 924.

108. PAYMENT—Evidence.—The inference from repayment by plaintiff of loans made by defendant, without any deduction of plaintiff's claim, that such claim had

been paid, is not cogent, where the repayment was in work.—Ran v. Torchiani, 84 N. Y. Supp. 886.

109. PLEADING—Bill of Particulars.—Plaintiff, who suffered an order for bill of particulars to go by default, must comply with the same, though it be merely to repeal the allegations of his complaint.—Quinn v. Fitzgerald 84 N. Y. Supp. 728.

110. PRINCIPAL AND AGENT—Right to Repudiate Contract Made on Sunday.—A principal cannot repudiate, as beyond the agent's authority, a contract made and completely executed by the agent on Sunday.—Rickards v. Rickards, Md., 56 Atl. Rep. 397.

111. PRINCIPAL AND SURETY — Building Contractor's Bond.—Sureties on a building contractor's bond held not discharged by the owner's payment of a final installment of the price agreed to be withheld in satisfaction of lien claims.—Mayes v. Lane, Ky., 76 S. W. Rep. 399.

112. PRINCIPAL AND SURETY—Necessity for Payment of Premium.—There being nothing in gnaranty contract to show that payment of premium was necessary to give it vitality, beneficiary may assume payment of premium.—Pacific Nat. Bank v. Ætna Indemnity Co., Wash., 74 Pac. Rep. 590.

113. PRINCIPAL AND SURETY—Repayment of Money Advanced.—Letter of attorney to agent of an indemnity company construed, and held to authorize the guaranty by him of contracts to repay money advanced to a contractor.—Pacific Nat. Bank v. Ætna Indemnity Co., Wash., 74 Pac. Rep. 590.

114. QUO WARRANTO—Application to Vacate Writ.—On the hearing of an application to vacate a writ of *quo warranto*, it was proper for the court to hear affidavits and counter affidavits as to the facts relied on.—People v. People's Gaslight & Coke Co., Ill., 68 N. E. Rep. 950.

115. RAILROADS—Knocking Trespasser off Car.—Question whether engineer acted within scope of his employment, where he knocked a trespasser off the car, held a question for the jury.—Pollatty v. Charleston & W. C. Ry., S. Car., 45 S. E. Rep. 932.

116. RECEIVERS—Attacking Appointment in Collateral Proceedings.—Where the court has jurisdiction as to subject matter and parties, its determination that the facts justified the appointment of a receiver cannot be inquired into in a collateral proceeding.—Powell v. National Bank of Commerce, Colo., 74 Pac. Rep. 536.

117. SALES—Damages Recoverable for Breached Warranty of Cow.—Measure of damages for breach of warranty of soundness of cow was difference between actual value and what it would have been if sound, with loss by communication of disease to buyer's other cattle.—Cummins v. Ennis, Del., 56 Atl. Rep. 377.

118. SUMMONS—Validity of Tax Sale.—Failure of town assessors to make and attach oath to the town roll held to make a sale for taxes thereunder void. — Raquette Falls Land Co. v. International Paper Co., 84 N. Y. Supp. 836.

119. TAXATION—National Banks. — Under U. S. Comp. St. 1901, § 5219, relative to the taxation of national bank stock, the expression "moneyed capital in the hands of individual citizens" construed. — Ankeny v. Blakley, Oreg., 74 Pac. Rep. 485.

120. TAXATION—Tax Sale and Purchase by State.—Land sold by comptroller for taxes and bid in for the people belongs, after period of redemption, to the people as equitable owners.—Raquette Falls Land Co. v. International Paper Co., 84 N. Y. Supp. 836.

121. TELEGRAPHS AND TELEPHONES — Failure to Deliver Message.—When a telegraph company failed to deliver a message beyond the free delivery limits without charges paid, it was negligence not to wire such fact to the sender.—Bryan v. Western Union Tel. Co., N. Car., 45 S. E. Rep. 948.

122. TRIAL—Error in Instructions When Not Prejudicial.—Incidental remarks of court, in charging jury, as to obligation of employer to furnish proper appliances, held not ground for reversal, where true rule was given in other parts of the charge. — Choctaw, O. & G. R. Co. v. Tennessee, U. S. S. C., 24 Sup. Ct. Rep 99.

123. TRIAL—Inconsistent Findings by Jury. — Where the jury returns a general verdict for defendant, and inconsistent special findings, some in favor of defendant, and some in favor of plaintiff, neither party is entitled to judgment on the verdict.—Dickerson v. Waldo, Okla., 74 Pac. Rep. 505.

124. TRIAL—Motion for Preference. — Where plaintiff moved to advance the date of trial on the ground that the case was a short cause, he could not withdraw the motion by notice to that effect in the notice of a similar motion on the same ground.—McCaffrey v. Butler, 84 N. Y. Supp. 776.

125. TRUSTS—Liability of Trustee's Estate. — While a *bona fide* purchaser from a constructive trustee will hold the land, the trustee's estate must account to the beneficiary's heir.—Williams v. Williams' Ex'r, Ky., 76 S. W. Rep. 413.

126. VENDOR AND PURCHASER—Earnest Money Recoverable When.—One held entitled to recover earnest money from a party who prevented performance of the contract at the appointed time and refused to perform thereafter.—Wright v. Levy, 84 N. Y. Supp. 885.

127. VENDOR AND PURCHASER—Effect of Judgment for Unpaid Installments on Rescinding Contract.—Where, after a vendor had recovered judgment for unpaid installments, she rescinded the contract and regained possession of the land, such rescission avoided the judgment. —Ward v. Warren, Oreg., 74 Pac. Rep. 482.

128. VENUE—Convenience of Witness —Venue will not be changed to New York or Kings county solely for convenience of witnesses.—Quinn v. Brooklyn Heights R. Co., 84 N. Y. Supp. 738.

129. WATERS AND WATER COURSES—Right of Riparian Owner to Punitive Damages.—In an action for injuries to land of upper riparian owner by construction of dam, plaintiff cannot recover punitive damages, unless the injuries were committed wantonly or maliciously.—Lynch v. Troxell, Pa., 56 Atl. Rep. 413.

130. WATERS AND WATER COURSES—Right to Regulate Water Rates.—A city is not precluded from exercising power to regulate water rates, given by Act, Ky. June 14, 1883, p. 1073, § 29, subd. 5 (Ky. St. 1899, § 3290), by prior ordinance granting water company the right to supply water under rules and regulations not inconsistent with law.—City of Owensboro v. Owensboro Waterworks Co., U. S. S. C., 24 Sup. Ct. Rep. 82.

131. WILLS—Contest Defeats Legacies.—A provision in a will, defeating the legacies therein if the will is contested, is valid.—*In re* Barandon's Estate, 84 N. Y Supp. 937.

132. WILLS—Conversion of Realty into Personalty.—Will construed, and held not to effect conversion of realty into personalty, so as to permit Columbia University to take the same, irrespective of charter limitations on power to hold real estate.—Phœnix v. Trustees of Columbia College, 84 N. Y. Supp. 897.

133. WILLS—Maintaining Homestead Out of Particular Fund.—Where a testator directed his executors to maintain his homestead from his general estate, a decree setting apart the income from a particular fund until vacated is final, so far as to require the executors to use the income only, and not the principal of the particular fund.—*In re* Stewart, 84 N. Y. Supp. 719.

134. WITNESSES—Druggist's Information not Privileged.—Code Civ. Proc. § 834, prohibiting a physician from disclosing professional information, held not to include a druggist.—Deutschmann v. Third Ave. R. Co., 84 N. Y. Supp. 887.

135. WITNESSES — Interest in Transaction With Deceased.—One interested in the result of the action may not testify to a transaction between him and deceased in the presence of another, though such other testify for the other party in regard thereto.—Swinebroad v. Bright, Ky., 76 S. W. Rep. 365.